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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

**NEWPORT PACIFIC CORPORATION and
MO'S ENTERPRISES, INC.**

No. 05-00995-KI

Plaintiffs,

**ANSWER AND AFFIRMATIVE
DEFENSES**

v.

**MOE'S SOUTHWEST GRILL, LLC, and
WRAPS OF THE NORTHWEST, L.L.C.**

By Defendant Moe's Southwest Grill, LLC

Defendant.

Defendant Moe's Southwest Grill, LLC ("Moe's Southwest Grill"), for its answer and affirmative defenses to the complaint of plaintiffs Newport Pacific Corporation and Mo's Enterprises, Inc. (collectively "plaintiffs" or "Newport"), alleges as follows:

1. Moe's Southwest Grill admits that plaintiffs have pled claims under the Lanham Act and the laws of the state of Oregon but deny that plaintiffs' claims have merit. Moe's Southwest Grill denies the remainder of the allegations set forth in paragraph 1 of the complaint.

2. Moe's Southwest Grill denies that it has committed any tortious acts in Oregon or elsewhere but admits that the Court has subject matter jurisdiction over plaintiffs' claims. Moe's Southwest Grill denies the remainder of the allegations set forth in paragraph 2 of the complaint.

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3. Moe's Southwest Grill denies that it has committed any tortious acts in Oregon or elsewhere. Moe's Southwest Grill admits the remainder of the allegations set forth in paragraph 3 of the complaint.

4. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 of the complaint, and the same are therefore denied.

5. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 of the complaint, and the same are therefore denied.

6. The averments of paragraph 6 of the complaint are not of a factual nature, and therefore require no responsive pleading.

7. Moe's Southwest Grill admits the allegations set forth in paragraph 7 of the complaint.

8. Moe's Southwest Grill admits the allegations set forth in paragraph 8 of the complaint.

9. The averments of paragraph 9 of the complaint are not of a factual nature, and therefore require no responsive pleading.

10. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the complaint, and the same are therefore denied.

11. Moe's Southwest Grill denies that plaintiffs' alleged trademark is famous. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of paragraph 11 of the complaint, and the same are therefore denied.

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12. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 of the complaint, and the same are therefore denied.

13. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13 of the complaint, and the same are therefore denied.

14. Moe's Southwest Grill denies that plaintiffs' alleged trademark has "national reach." Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of paragraph 14 of the complaint, and the same are therefore denied.

15. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the complaint, and the same are therefore denied.

16. Moe's Southwest Grill admits that it has been franchising "fast-casual" Southwestern restaurants throughout the United States under the trademark and service mark MOE'S SOUTHWEST GRILL since November 2000. Moe's Southwest Grill denies the remainder of the allegations of paragraph 16 of the complaint.

17. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 of the complaint, and the same are therefore denied.

18. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to truth of the allegations of paragraph 18 of the complaint, and the same are therefore denied.

19. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 of the complaint, and the same are therefore denied.

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20. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 of the complaint, and the same are therefore denied.

21. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 of the complaint, and the same are therefore denied.

22. Moe's Southwest Grill is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22 of the complaint, and the same are therefore denied.

23. Although Moe's Southwest Grill admits that it makes some use of the term "Moe's" to identify the services offered by the restaurants at issue, the principal name and mark of the restaurants is MOE'S SOUTHWEST GRILL. Moe's Southwest Grill denies the remainder of the allegations of paragraph 23 of the complaint.

24. Moe's Southwest Grill admits that the principal name and mark of the restaurants it owns and franchises is MOE'S SOUTHWEST GRILL. Moe's Southwest Grill admits that, in its logo, the words "southwest grill" appear in smaller typeface than the word "Moe's," but Moe's Southwest Grill further states that the words are an important and distinctive element of the logo as is readily apparent from the logo itself, a copy of which is set forth below:



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Moe's Southwest Grill further admits that its logo is distinctly different than plaintiffs' logo, a copy of which is set forth below:



Moe's Southwest Grill admits that its distinctive logo appears on signage, menus, and other trade dress of restaurants operated under the MOE'S SOUTHWEST GRILL mark. Moe's Southwest Grill denies the remainder of the allegations of paragraph 24 of the complaint.

25. Moe's Southwest Grill admits that it has been in business and has used the MOE'S SOUTHWEST GRILL mark continuously in commerce in the United States since at least as early as November 2000. Moe's Southwest Grill further admits that there are more than 225 MOE'S SOUTHWEST GRILL branded restaurants across the United States and that it is one of the fastest growing franchises in the United States. Moe's Southwest Grill denies the remainder of the allegations of paragraph 25 of the complaint.

26. Moe's Southwest Grill admits that Wraps of the Northwest, L.L.C., opened a MOE'S SOUTHWEST GRILL branded restaurant in Wilsonville, Oregon, in or about April 2005. Moe's Southwest Grill denies the remainder of the allegations of paragraph 26 of the complaint.

27. Admitted.

28. Moe's Southwest Grill admits that it and its franchisees have made some use of the term "Moe's" on some menus, information materials, and advertising materials in a manner that is secondary to and used only after use of Moe's Southwest Grill's primary mark MOE'S SOUTHWEST GRILL. Moe's Southwest Grill denies the remainder of the allegations of paragraph 28 of the complaint.

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29. Moe's Southwest Grill admits that patrons of MOE'S SOUTHWEST GRILL restaurants are greeted with the salutation, "Welcome to Moe's." Moe's Southwest Grill denies the remainder of the allegations of paragraph 29 of the complaint.

30. Moe's Southwest Grill denies the allegations of paragraph 30 of the complaint.

31. Moe's Southwest Grill denies the allegations of paragraph 31 of the complaint.

32. Moe's Southwest Grill admits that both parties offer restaurant services; however, Moe's Southwest Grill denies that those services are identical. Indeed, the parties' services are remarkably dissimilar. Plaintiffs' restaurants feature New England clam chowder and Oregon seafood. By contrast, Moe's Southwest Grill restaurants feature fresh Southwest cuisine with a healthy twist in a relaxed atmosphere with classic music. Moe's Southwest Grill denies the remainder of the allegations of paragraph 32 of the complaint.

33. Moe's Southwest Grill admits that its uses the term "Moe's" and the salutation "Welcome to Moe's" without plaintiffs' express consent or permission because no such consent or permission is necessary. Moe's Southwest Grill further respond that its uses of the term and salutation are with plaintiffs' implicit consent because defendant Moe's Southwest Grill has used the terms since 2000 without objection from plaintiffs. Moe's Southwest Grill denies the remainder of the allegations of paragraph 33 of the complaint.

34. The reference to 15 U.S.C. § 1072 and constructive notice in the first sentence of paragraph 34 of the complaint is a legal conclusion as to which neither an admission nor denial is required. Moe's Southwest Grill denies the remainder of the allegations of paragraph 34 of the complaint.

35. Moe's Southwest Grill denies the allegations of paragraph 35 of the complaint.

36. Moe's Southwest Grill denies the allegations of paragraph 36 of the complaint.

37. Moe's Southwest Grill repeats and incorporates its admissions and denials set forth above in response to paragraphs 1-36 of the complaint.

38. Moe's Southwest Grill denies the allegations of paragraph 38 of the complaint.

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39. Moe's Southwest Grill denies the allegations of paragraph 39 of the complaint.
40. Moe's Southwest Grill denies the allegations of paragraph 40 of the complaint.
41. Moe's Southwest Grill denies the allegations of paragraph 41 of the complaint.
42. Moe's Southwest Grill repeats and incorporates its admissions and denials set forth above in response to paragraphs 1-41 of the complaint.
43. Moe's Southwest Grill denies the allegations of paragraph 43 of the complaint.
44. Moe's Southwest Grill denies the allegations of paragraph 44 of the complaint.
45. Moe's Southwest Grill denies the allegations of paragraph 45 of the complaint.
46. Moe's Southwest Grill denies the allegations of paragraph 46 of the complaint.
47. Moe's Southwest Grill repeats and incorporates its admissions and denials set forth above in response to paragraphs 1-46 of the complaint.
48. Moe's Southwest Grill denies the allegations of paragraph 48 of the complaint.
49. Moe's Southwest Grill denies the allegations of paragraph 49 of the complaint.
50. Moe's Southwest Grill denies the allegations of paragraph 50 of the complaint.
51. Moe's Southwest Grill denies the allegations of paragraph 51 of the complaint.
52. Moe's Southwest Grill denies the allegations of paragraph 52 of the complaint.
53. Moe's Southwest Grill denies the allegations of paragraph 53 of the complaint.
54. Moe's Southwest Grill denies the allegations of paragraph 54 of the complaint.
55. Moe's Southwest Grill repeats and incorporates its admissions and denials set forth above in response to paragraphs 1-54 of the complaint.
56. Moe's Southwest Grill denies the allegations of paragraph 56 of the complaint.
57. Moe's Southwest Grill denies the allegations of paragraph 57 of the complaint.
58. Moe's Southwest Grill repeats and incorporates its admissions and denials set forth above in response to paragraphs 1-57 of the complaint.
59. Moe's Southwest Grill denies the allegations of paragraph 59 of the complaint.
60. Moe's Southwest Grill denies the allegations of paragraph 60 of the complaint.

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61. Moe's Southwest Grill denies the allegations of paragraph 61 of the complaint.
62. Moe's Southwest Grill denies the allegations of paragraph 62 of the complaint.
63. Moe's Southwest Grill repeats and incorporates its admissions and denials set forth above in response to paragraphs 1-62 of the complaint.
64. Moe's Southwest Grill denies the allegations of paragraph 64 of the complaint.
65. Moe's Southwest Grill denies the allegations of paragraph 65 of the complaint.
66. Moe's Southwest Grill denies the allegations of paragraph 66 of the complaint.
67. Moe's Southwest Grill repeats and incorporates its admissions and denials set forth above in response to paragraphs 1-66 of the complaint.
68. Moe's Southwest Grill denies the allegations of paragraph 68 of the complaint.
69. Moe's Southwest Grill denies the allegations of paragraph 69 of the complaint.
70. Moe's Southwest Grill denies the allegations of paragraph 70 of the complaint.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

71. The complaint fails to state a claim on which relief can be granted.

SECOND DEFENSE

72. Plaintiffs' claims are barred by laches and/or estoppel due to plaintiffs' unreasonable delay in bringing this action.

THIRD DEFENSE

73. Plaintiffs' claims are barred by waiver.

FOURTH DEFENSE

74. Plaintiff has failed to mitigate its damages.

FIFTH DEFENSE

75. Some or all of Moe's Southwest Grill's alleged infringing activities constitute protected fair use.

Except as specifically admitted, Moe's Southwest Grill denies each and every allegation contained in plaintiffs' complaint, including plaintiffs' prayer for relief.

PRAYER

WHEREFORE, Moe's Southwest Grill requests that the complaint be dismissed with prejudice and that the Court grant Moe's Southwest Grill recovery of its costs and reasonable attorneys' fees and such other and additional relief as the Court deems just and proper.

DATED: August 15, 2005

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By s/ Kenneth R. Davis, II

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